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In The

# Supreme Court of the United States

October Term, 1995

JOE STIFFARM,

*Petitioner,*

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware Corporation,

*Respondent.*

**Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Are railroad workers deprived of a right to bring a claim for intentional infliction of emotional distress under both state law and under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, *et seq.*?

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## PETITION FOR WRIT OF CERTIORARI

Joe Stiffarm respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The Ninth Circuit's unpublished opinion is reprinted at App. 1-9. The District Court's opinions and orders, which were all unpublished, are reprinted at App. 10-32.

## JURISDICTION

The court of appeals entered its judgment on April 1, 1996 (App. 1-9). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 1 of the Federal Employers' Liability Act provides that

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

45 U.S.C. § 51.

## STATEMENT OF THE CASE

The Petitioner, Joseph Stiffarm, brought a diversity action under 28 U.S.C. § 1332, against his employer, Burlington Northern Railroad Company. Stiffarm alleged that he was entitled to a remedy for personal injuries under various state-law tort claims, including defamation, the tort of intentional infliction of emotional distress, and punitive damages. The District Court dismissed all of Stiffarm's claims except the defamation claim on the ground that the state-law claims were preempted by the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq*. The case then proceeded to jury trial solely on the defamation claim and on December 8, 1994, a jury rendered a verdict in favor of the Burlington Northern Railroad.

On appeal pursuant to 28 U.S.C. § 91, Stiffarm argued that the District Court had erred in ruling that his state-law claims were preempted by the RLA. In an unpublished decision, the Ninth Circuit Court of Appeals held that the District Court "was wrong" in holding that the "Railway Labor Act preempted Stiffarm's claim for intentional infliction of emotional distress." The Ninth Circuit, however, then affirmed the decision anyway, holding that even though the RLA did not preempt the claim, the "Federal Employers' Liability Act preempts the state law claim." The Ninth Circuit said it expressed "no opinion as to whether or under what circumstances intentional infliction of emotional distress is actionable under the FELA. We leave that question for the parties to litigate in [Stiffarm's] state court FELA suit." App. 4, 6.

The evidence and allegations, briefly summarized, indicate that at the time of the events that led to this

litigation Mr. Stiffarm, age 50, had been working for the railroad for almost 30 years. He hired on as a track laborer shortly after graduating from high school on the Fort Belknap Indian Reservation in Harlem, Montana. Within a few years, he was promoted to the position of assistant foreman and by the time he was 30, the railroad had him supervising track crews of up to 60 men. At one time, the railroad placed him in charge of all the maintenance on Burlington Northern tracks across the northern portion of the state of Montana. His crews set production records. The railroad held contests with crews in other states to see if they could match the efforts of Mr. Stiffarm's men. The railroad gave Mr. Stiffarm letters of commendation for his leadership skills.

One morning in the fall of 1991, Mr. Stiffarm was called in to railroad headquarters in Havre, Montana. He was placed in a room and questioned by a railroad policeman ("special agent") for over an hour. The "special agent" accused Stiffarm of taking monetary kickbacks from a local construction contractor in return for favoring that contractor in awarding contracts for construction projects with the railroad. Stiffarm told the "special agent" that his job and livelihood were too important to him to do anything like that, but the "special agent" pressed on for another hour and a half. He told Mr. Stiffarm that he had evidence linking him to kickbacks. He would turn off the audio tape and tell Mr. Stiffarm that there was hard evidence against him and if he did not confess, he could end up losing his job and going to jail. Stiffarm maintained his innocence. He was then directed by the "special agent" to provide copies of all his personal financial records to prove his innocence. Mr. Stiffarm complied. The records showed no wrongdoing.

In the weeks and months that followed, the railroad refused to inform Mr. Stiffarm about either the status or the results of the investigation. In the meantime, word spread through Mr. Stiffarm's small hometown of Havre, Montana, that he was being investigated for taking kickbacks. People started calling him the "kickback kid." The pressure was hard on him mentally. He started having difficulty sleeping and concentrating.

Mr. Stiffarm made several attempts to obtain the investigation results from the railroad, but the railroad continued to stonewall him. The railroad refused to divulge the names of the persons who had accused Mr. Stiffarm of this criminal conduct. It would not tell him whether the investigation was still ongoing or if he had been cleared. He was forced to hire an attorney, who directed correspondence to the railroad stating among other things that:

> Mr. Stiffarm was accused by you of taking kickbacks from contractors. Mr. Stiffarm had nothing to do with any such matter whatsoever and he is quite upset and resentful that the accusations have been made.
>
> We would greatly appreciate it if you would immediately forward to us any information, written or otherwise, you have compiled about Mr. Stiffarm and your allegations that he has been involved with contractor kickbacks. Among other things, we would like the names and addresses of the persons who are making these allegations, when they made the allegations, and what information they are claiming to have supporting their contentions.

Similar requests were made over the next year, but the railroad continued to refuse to provide any information. In the meantime, the rumors continued to spread that Mr. Stiffarm had committed felonies against his employer. His emotional well being continued to deteriorate. The railroad's continued refusal to provide information forced Mr. Stiffarm to file this lawsuit on April 15, 1993. In addition to requesting an order to force the railroad to turn over the investigation, Mr. Stiffarm requested damages for his emotional distress. He also pled that the railroad had contributed to the slander of his character.

Over two years after this whole incident began, the railroad finally divulged its investigative file pursuant to formal requests for production under Fed.R.Civ.P. 34. The investigation revealed that within a few weeks after his interrogation in the fall of 1991, the railroad had cleared Mr. Stiffarm of all charges. The investigation had determined that Mr. Stiffarm had "no authority to negotiate or award work to outside contractors." On the jobs where kickbacks were supposed to have been given to him, he was not even involved in the work. His accusers had been two other local construction contractors, who apparently wanted to destroy their competitor by telling the railroad that the competitor was giving out kickbacks. The railroad had closed the investigation on November 15, 1991, just six weeks after interrogating Stiffarm. Its final report concluded that there was "no information . . . which support[ed] the allegations of kickbacks." Nevertheless, the railroad refused to provide Mr. Stiffarm with any information for over two years, knowing full well the emotional turmoil that this was causing him.

As set forth above, the District Court dismissed Mr. Stiffarm's primary claim that the railroad had intentionally inflicted emotional distress. It allowed the case to go to trial solely on the claim that the railroad had defamed Mr. Stiffarm, a claim which better fit the actions of the two contractors, whose identities had been concealed from Mr. Stiffarm for over two years.[1] Thus, the District Court's decision to strike Mr. Stiffarm's intentional infliction claim deprived Mr. Stiffarm of an opportunity to have the jury decide the case on the cause of action which ideally suited his case. The jury determined that the railroad had not defamed Mr. Stiffarm.

## REASON FOR GRANTING THE PETITION

This case presents an important issue for all railroad workers concerning their rights under state-law and under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-56. On the one hand, the Ninth Circuit has ruled that Mr. Stiffarm has no state-law claim for the intentional infliction of emotional distress because the claim is preempted by the FELA. On the other hand, the Ninth Circuit has suggested, without deciding the issue, that the FELA may not provide him any remedy either for the intentional infliction of emotional distress. By this Petition, we respectfully request that this Court provide guidance for this potentially anomalous situation.

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[1] The railroad's decision to conceal the identities of these accusers jeopardized Mr. Stiffarm's right to a remedy against them, because the statute of limitations for defamation in Montana is two years. Mont. Code Ann. § 27-2-204(3) (1995).

This Court has recently decided two cases involving a railroader's rights under the RLA, state-law tort claims, and the FELA. In *Hawaiian Airlines, Inc. v. Norris*, ___ U.S. ___, 129 L.Ed.2d 203, 114 Sup. Ct. 2239 (1994), this Court unanimously held that the "RLA does not preempt [a] state law claim" for wrongful discharge, even though the plaintiff could have sought redress through the RLA's arbitral mechanism. The Ninth Circuit relied upon *Hawaiian Airlines* in holding that the District Court had erred in dismissing Mr. Stiffarm's state-law claim for intentional infliction of emotional distress on the basis of RLA preemption. App. 2-4.

In the same year this Court decided *Hawaiian Airlines, supra,* however, it also decided *Consolidated Rail Corp. v. Gottshall*, ___ U.S. ___, 114 Sup. Ct. 2396, 129 L.Ed.2d 427 (1994). *Gottshall* held that the tort of *negligent* infliction of emotional distress is cognizable under the FELA, but only if the emotional distress is accompanied by physical injury or near physical injury. In a footnote, however, this Court stated that the holding was limited to "negligent" infliction of emotional distress and that the Court was "not concerned [in that case] with the separate tort of intentional infliction of emotional distress." 129 L.Ed.2d at 439, n. 2. Previously, in *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 107 Sup. Ct. 1410, 94 L.Ed.2d 563 (1987), this Court had held that a claim for *intentional* infliction of emotional distress might be cognizable under the FELA, but remanded the case for further development of the record in the court below. After this occurred, the parties apparently settled the case prior to trial and hence, no such complete record ever became available to this Court.

Because of the uncertainty about his right to bring a state-law claim for intentional infliction of emotional distress, Mr. Stiffarm took the precaution of filing an alternative FELA action for intentional infliction of emotional distress in the state court of Montana. App. 33-43. The difficulty, however, is that the railroad has also moved to dismiss the state court action on the theory that Mr. Stiffarm has no such claim under the FELA, either. App. 44-45.

All railroad workers who have suffered intentional infliction of emotional distress at the hands of their railroad employers face the same dilemma Mr. Stiffarm faces here. If they file state-law claims, they risk having their claims dismissed on the ground that they are preempted by FELA. Yet because there is no clear answer as to whether such a claim is cognizable under the FELA, the railroad worker risks having a FELA claim dismissed as well or being told that he or she should have brought a state-law claim.

Mr. Stiffarm is faced with the choice of petitioning this Court for review of the Ninth Circuit's ruling immediately or awaiting the outcome of his still pending FELA claim which is filed in state court. He believes he must file the petition immediately or he may forfeit his rights to assert a state-law claim should this Court subsequently – on appeal from the state-court FELA action – hold that the Ninth Circuit erred. *See* 11 Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure*, § 2864 at 359-360 (1995).

## CONCLUSION

The Petition for Writ of Certiorari should be granted. Injured railroad workers like Mr. Stiffarm should either have a state right to a remedy for intentional infliction of emotional distress as all of their other fellow citizens have, or they should have a claim under the FELA. Mr. Stiffarm should not be left in a position where he somehow falls between the cracks and has neither a state-law claim nor an FELA claim.

Respectfully submitted,

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**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| JOE STIFFARM,<br>Plaintiff-Appellant,<br>v.<br>BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,<br>Defendant-Appellee. | No. 95-35136<br>D.C. No. CV-93-00045-PGH<br>MEMORANDUM*<br>(Filed Apr. 1, 1996) |

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted February 7, 1996
Seattle, Washington

Before: WRIGHT, HALL and TROTT, Circuit Judges.

In this case we are concerned with two preemption questions. We must decide whether either the Railway Labor Act or the Federal Employers Liability Act preempts a railroad employee's state-law claim of intentional infliction of emotional distress. We also consider several issues arising from the trial of the employee's non-preempted claims.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

## I. Preemption Issues

The district court ruled that the Railway Labor Act preempted Stiffarm's claim for intentional infliction of emotional distress. We hold that this decision was wrong, but we affirm because the Federal Employers' Liability Act preempts the statelaw claim.

### A. Railway Labor Act Preemption

In *Hawaiian Airlines v. Norris*, 114 S. Ct. 2239 (1994), the Court took a narrow view of preemption under the RLA: "a state-law cause of action is not preempted by the RLA if it involves rights that exist independent of the collective-bargaining agreement." *Id.* at 2247. *Hawaiian Airlines* dictates that the RLA does not preempt Stiffarm's emotional distress claim. The "CBA is not the only source" of Stiffarm's right to be free from intentional infliction of emotional distress. 114 S. Ct. at 2246 (internal quotations omitted). "Wholly apart from any provision of the CBA, [the Railroad] had a state-law obligation" not to harass Stiffarm. *Id.*

The district court, in an order preceding the *Hawaiian Airlines* decision, determined that because the Railroad's conduct could "serve as the basis for grievance procedures," the dispute was " 'arguably' governed by the collective bargaining agreement." The Court rejected this rationale in *Hawaiian Airlines*:

> "[E]ven if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as

> long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement. . . . "

*Id.* at 2249 (quoting and adopting standard of *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 408-10)).

We find unpersuasive the Railroad's argument that preemption is required because its right to perform an informal investigation is an implied term of the CBA. Here, in contrast to the cases the Railroad cites, there is no dispute that the Railroad had an implied right under the CBA to investigate and interrogate Stiffarm. The only issue is the "purely factual inquiry" into whether the Railroad's conduct was sufficient to cause severe emotional distress.[1] *Hawaiian Airlines*, 114 S. Ct. at 2251. *Compare Schlacter-Jones v. General Telephone*, 936 F.2d 435, 440 (9th Cir. 1991) (court held examination of CBA necessary to determine whether drug and alcohol screening was within powers granted to management); *Douglas v. American Info. Technologies Corp.*, 877 F.2d 565, 571 (7th Cir. 1989) (determination of whether working conditions were

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[1] In *Sacco v. High Country Indep. Press*, 271 Mont. 209, 896 P.2d 411 (1995), the court did away with the requirement that intentional infliction of emotional distress claims be restricted to "extreme and outrageous conduct." Rather, the court held, "[a]n independent cause of action for intentional infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's intentional act or omission." *Id.* at 238. While the breadth of this holding may suggest a conflict with other federal labor law, it does not affect the RLA preemption analysis. Nothing in *Hawaiian Airlines* suggests that the RLA prevents states from providing protections to workers that exceed the scope of the CBA.

"extreme and outrageous" depended on interpretation of express and implied terms of CBA).

The Railroad points to nothing in the CBA that the court could interpret to determine the applicable standard of conduct for such an investigation. The RLA does not preempt Stiffarm's claim for intentional infliction of emotional distress.[2]

B. FELA Preemption

The Railroad argues in the alternative that the Federal Employers' Liability Act, 45 U.S.C. § 51 (FELA) preempts Stiffarm's state-law claim. Whether the FELA provides a remedy for intentional infliction of emotional distress is debatable, *see Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2403 n.2 (1994). That question is not before us, however, because Stiffarm did not allege a cause of action under the FELA in this case. He split his

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[2] We also affirm the district court's denial of Stiffarm's motion to amend his complaint to add other state-law causes of action. None of the proposed amendments states a claim for which relief can be granted. Stiffarm's proposed cause of action "to compel Railroad to divulge all information" is moot because the railroad produced its file during discovery. The fraud claim fails as well because Stiffarm did not allege several of the basic elements of fraud by omission, including a duty to disclose and reliance. Finally, his reliance on the Montana case of *Lauman v. Lee*, 626 P.2d 830 (Mont. 1981) is misplaced. *Lauman* requires that the plaintiff allege either an underlying tort or that he is entitled to compensatory damages because he has "suffer[ed] detriment from the unlawful act of another." *Id.* at 832-33 ("the finding of actual damages is the primary requisite step toward any award of exemplary damages"). Stiffarm has done neither.

claim, filing a FELA action in state court. We must determine only whether intentional infliction of emotional distress falls within the field Congress intended the FELA to occupy. If it does, Stiffarm may not resort to state law even if the FELA were to deny him a remedy.[3]

The FELA is " 'comprehensive and also exclusive' in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. . . . ' " *Wildman v. Burlington N. R.R.*, 825 F.2d 1392, 1395 (9th Cir. 1987) (quoting *New York Cent. & H.R. R.R. v. Tonsellito*, 244 U.S. 360 (1917)); *see also South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371 (1953) ("[S]upplanting a patchwork of state legislation with a nationwide uniform system of liberal remedial rules, [the FELA] displaces any state law trenching on the province of the Act.").

To determine the scope of the FELA the Supreme Court looks to the language of the statute and common law developments. *Gottshall*, 114 S. Ct. at 2403. "The coverage of the [FELA] is defined in broad language, which has been construed even more broadly." *Atchison, Topeka & Santa Fe R.R. Co. v. Buell*, 480 U.S. 557, 561-62

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[3] We reject Stiffarm's argument that it is a "Catch-22" to deny him access to a state-law remedy if the FELA affords no recovery for intentional infliction of emotional distress. That the FELA occupies the entire field of railroad employee injuries does not mean that every railroader's injury is compensable. For example, in *Gottshall*, 114 S. Ct. at 2410, the Court concluded that the FELA provides a remedy for negligent infliction of emotional distress, but only where the plaintiff's injury arose within the "zone of danger." Those outside the zone of danger have no cause of action, either under the FELA or under state law.

(1987). Purely emotional injury falls within the scope of the Act. *Gottshall,* 114 S. Ct. at 2407-08 (FELA provides remedy for negligent infliction of emotional distress in limited circumstances). Although the statute explicitly creates a cause of action only for negligence, it has been interpreted to apply to intentional torts in some circumstances. *See, e.g., Buell,* 480 U.S. at 562 n.8 (1987) (collecting cases); *Taylor v. Burlington N. R.R.,* 787 F.2d 1309, 1314 (9th Cir. 1986) (recognizing FELA claims for assault and harassment); *Lancaster v. Norfolk & W. Ry.,* 773 F.2d 807, 812-13 (7th Cir. 1986), *cert. denied,* 480 U.S. 945 (1987) (assault resulting in emotional injury; "application of the FELA to (at least some) intentional torts is too well settled to be questioned").

Because it has components of personal, though not necessarily physical, injury, intentional infliction of emotional distress is closely related to negligent infliction and to FELA-covered intentional torts such as assault. By contrast, it is markedly unlike the causes of action that courts have found to be outside the FELA's reach. *See, e.g., Wharf v. Burlington Northern R.R. Co.,* 60 F.3d 631, 638 (9th Cir. 1995) (FELA does not remedy wrongful termination); *Bouchet v. Texas Mexican Ry. Co.,* 915 S.W.2d 107, 111 (Tex. 1996) (FELA does not preempt state anti-discrimination statute). These factors lead us to conclude that intentional infliction of emotional distress is within the field Congress intended the FELA to occupy. Stiffarm's remedy, if he has one, must be found in the FELA.

We express no opinion as to whether or under what circumstances intentional infliction of emotional distress is actionable under the FELA. We leave that question for the parties to litigate in their state court FELA suit.

## II. CLAIMS RELATING TO DEFAMATION TRIAL

### A. Refusal to Instruct on Lack of Evidence

Stiffarm asked the court to read, as a jury instruction, the Railroad's response to a request for admission in which it admitted that "in the course of its investigation it found insufficient evidence that Joe Stiffarm had taken bribes, although there were two statements from witnesses that suggested Joe Stiffarm may have been involved in a plan to take bribes." Stiffarm claims the court abused its discretion when it refused to instruct the jury that there was no evidence that Stiffarm took kickbacks. As a result, he says, the Railroad was allowed to repeat the allegations, to Stiffarm's detriment.

Stiffarm in essence asked the court to direct the jury to find in his favor on the issue of falsity. He cites no valid legal grounds for his contention that the court was required to do so.

Judge Hatfield held that the proposed instruction would have restricted the Railroad's right to put on its case. He reasoned that "the railroad was clearly entitled to defend against Stiffarm's claim of defamation by presenting evidence to establish that affirmative statements of misconduct on the part of Stiffarm were communicated to the railroad by private parties." Stiffarm does not suggest that the Railroad was permitted to submit evidence that conflicted with its admission. And Stiffarm does not appear to have asked that the admission be entered into evidence. *See* Fed. R. Civ. Proc. 36 ("Any matter admitted under this rule is conclusively established.") There was no abuse of discretion.

B. Joint and Several Liability

Stiffarm also argues that the court abused its discretion when it refused to instruct the jury that the principle of joint and several liability applied. The court correctly ruled that it should not instruct on joint and several liability because slander is "incapable of joint commission." Numerous cases hold that slander is an individual tort, and the "separate utterances, even of the same words, by different persons constitute distinct offenses." *Ardoyno v. Ungar*, 352 So. 2d 320, 321 & n.1 (La. App. 1977). "Two or more individuals uttering slander against the same person cannot be held jointly liable" absent concerted action or conspiracy. *Miles v. Perry*, 529 A.2d 199, 204 (Conn. App. 1987). *See also Shuping v. Barber*, 365 S.E.2d 712, 716 (N.C. App. 1988) (same).

The language Stiffarm requested would have allowed the jury to hold the Railroad responsible for the defamatory statements made by the contractors. The court correctly refused to give the proffered instruction.

C. Excluded Evidence

The district court excluded evidence from two of Stiffarm's witnesses, Tom Patrick and Linda Patrick-Hayes. The court found that Stiffarm failed to disclose this information in response to interrogatories, or to supplement the interrogatories when he learned, late in the discovery process, how they would testify.

Stiffarm claims that he was not required to supplement his discovery responses because the Railroad interviewed Tom Patrick, and Fed. R. Civ. P. 26 does not

require supplementation if the information "otherwise has been made known to the other party during the discovery process." The court properly rejected this argument because an informal interview is not part of the discovery process. We note also that the Railroad interviewed only Tom. Linda's testimony which was not disclosed in any fashion until three days before trial, was more damaging. Only she would have testified that Railroad officials discussed the kickbacks within earshot of Patrick's employees.

Stiffarm argues that the Railroad's counsel misrepresented his knowledge of Patrick's proposed testimony. Counsel, however, told the district court that, although he knew Railroad officials had talked to Patrick, he believed their conversations were privileged under the defamation statute. He said he had no knowledge that the conversations went beyond the scope of the investigation. Nothing in the record conflicts with this statement, and the district court apparently accepted this rationale. We find no abuse of discretion.

## CONCLUSION

Although the RLA does not preempt Stiffarm's emotional distress claim, the FELA does. There was no error in the court's rulings during trial. **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

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| JOE STIFFARM,<br>Plaintiff,<br>vs.<br>BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,<br>Defendant. | ) | NO. CV-93-045-GF<br><br>MEMORANDUM AND ORDER<br>(Filed Jan. 23, 1995) |

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A Special Verdict was returned by a jury against the plaintiff, Joe Stiffarm, upon the claim for defamation he advances against the defendant, Burlington Northern Railroad Company ("Railroad"). Stiffarm now presents the court with a motion requesting the court to grant him a new trial upon that claim. Stiffarm predicates his motion upon three alternate bases. First, Stiffarm argues the court should have instructed the jury that certain statements made by third parties to the Railroad, which prompted that entity's investigation of Stiffarm, were untrue. Second, Stiffarm asserts the court erroneously refused to instruct the jury upon joint and several liability. Finally, Stiffarm contends the court erred by precluding Stiffarm from presenting certain testimony of two individuals to whom defamatory statements regarding

Stiffarm were purportedly made by agents of the Railroad. The court addresses the merits of all aspects of Stiffarm's motion, each in turn.

## FALSITY OF STATEMENTS

The principal issue tried to the jury in this matter was whether or not the Railroad defamed Stiffarm by communicating slanderous statements to third persons regarding Stiffarm's participation in a "kickback" scheme purportedly attendant to contracts executed by the Railroad and certain private contractors in the Havre, Montana area. The undisputed evidence of record established that the Railroad, in response to statements made to Railroad officials by two private contractors asserting Stiffarm was taking "kickbacks", undertook an investigation to determine whether certain Railroad employees, including Stiffarm, had participated in such a scheme. In the course of the investigation, the Railroad investigators questioned numerous Railroad employees including Stiffarm. The investigation did not result in any disciplinary action being taken against any employee of the Railroad.

Subsequent to the investigation, Stiffarm instituted the present action for defamation against the Railroad. Stiffarm also instituted a defamation action in state court against the two private contractors who had made the statement to Railroad officials that prompted the Railroad to undertake the referenced investigation. The latter suit has apparently not proceeded to trial at this juncture.

The jury in the present action, having assessed the evidence presented, and having been properly instructed upon the elements of a claim for defamation which the

law required Stiffarm to prove to sustain his claim, concluded that the Railroad had not defamed Stiffarm. The evidence of record clearly supports the jury's conclusion.

The thrust of Stiffarm's claim against the Railroad was that the Railroad defamed him by communicating slanderous statements to third-parties or otherwise "leaked" information to the community of Havre, Montana, indicating Stiffarm had participated in an illegal "kickback" scheme. Stiffarm, however, utterly failed to present any evidence establishing the fact that any officer, agent or employee of the Railroad communicated a slanderous statement to any third party. In response to Stiffarm's suggestion that the Railroad somehow defamed Stiffarm by allowing information to "leak" into the community of Havre, Montana, the Railroad presented detailed evidence regarding its reason for initiating the investigation and the manner in which the investigation was conducted. The strategy employed by the Railroad was legitimate and necessary to convince the jury that the initial source of information regarding the existence of a "kickback" scheme, and Stiffarm's participation in that scheme emanated, not from the Railroad, but from private contractors doing business in the community of Havre, Montana. The trial testimony of those contractors affirmed this fact to the satisfaction of the jury.

Stiffarm suggests the court should have instructed the jury that the statements made by the contractors which prompted the investigation were untrue, and that no evidence to support the statements existed. Stiffarm's argument is hardly compelling. First, there exists absolutely no basis in the evidence, or the law, to support

Stiffarm's position. Second, Stiffarm ignores the testimony of the private contractors, which affirmed the fact the contractors represented the statements they made regarding Stiffarm to be true. The Railroad was clearly entitled to defend against Stiffarm's claim of defamation by presenting evidence to establish that affirmative statements of misconduct on the part of Stiffarm were communicated to the Railroad by private parties. Stiffarm cannot, by the simple expediency of filing separate lawsuits in different forums, preclude the Railroad from presenting evidence establishing that it was not the party responsible for publishing, or republishing, the statement that may have defamed Stiffarm.[1]

## JOINT AND SEVERAL LIABILITY

Stiffarm requested the court to instruct the jury on the principle of joint and several liability.[2] The tort of

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[1] Stiffarm further ignores the fact that the Railroad, in mitigation of damages and to rebut the charge of malice, was properly allowed to introduce evidence of prior publications of slanderous statements predicated upon the purported "kickback" scheme, in order to emphasize to the jury that the Railroad had, at most, repeated a charge made to it by third party sources. *See, e.g., Darling v. Mansfield*, 192 N.W. 595 (Mich. 1923)

[2] Stiffarm proposed the following alternate instructions:

> (i) More than one person may be liable for causing an injury. A defendant may not avoid liability by claiming that some other person, whether or not named as a defendant in this action, helped cause the injury.

slander, however, has been viewed historically as incapable of joint commission. *See, Duquesne Distributing Co. v. Greenbaum,* 121 S.W. 1026 (Ky. 1909); *Randall Dairy Co. v. Pevly Dairy Co.,* 9 N.E.2d 657 (Ill.App. 1934).[3] The court is not aware, and neither party has cited a case decided by the Montana Supreme Court which addresses this precise issue. There exists no reason to believe, however, that the Montana court would diverge from what is clearly a prevailing view. *See, Tucker v. Wallace,* 90 Mont. 359 (1931)

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> (ii) If you find that Burlington Northern acted concurrently with other persons or entities to cause an indivisible injury to Joe Stiffarm, Burlington Northern is liable for all damages suffered by Stiffarm as a result of that injury. Defamation resulting from the communication of a slanderous statement, however, unlike other torts, is generally recognized as an individual tort and capable of joint commission.

While numerous exceptions to the general rule have been recognized (conspiracy to slander, *see, e.g., Horn v. Ruess,* 231 P.2d 756 (Ariz. 1951); slanderous statement issued at the instigation of another, *see, e.g., Carter v. Pfannenschmidt,* 467 S.W.2d 777 (Ky. 1971); *respondeat superior, see, e.g., Barlow v. International Harvester Co.,* 522 P.2d 1102 (Id. 1974), none of the exceptions are of pertinence to the present case.

[3] In *Yocum v. Husted,* 167 N.W. 663 (Iowa 1918), the court explained the justification for the rule as being that slander must necessarily be committed by an individual because two or more persons cannot jointly utter the same words, and each must be responsible for his own words. 167 N.W. at 665. A further often-stated justification for the rule is that the words spoken by one may occasion greater injury than when spoken by another and each should be responsible only for the injury inflicted by his own independent act. *Duquesne Distributing Co., supra.*

(following English rule with respect to liability for republication of slanderous statement).

Stiffarm argues that it was necessary for the court to give an instruction informing the jury that "more than one person could be responsible for the same tort", in this case, the alleged defamation of Stiffarm. Stiffarm's argument is contrary to the well-established general rule discussed. Stiffarm suggests, however, that a distinction must be drawn between the principle of joint liability and the concept of "indivisible harm", citing the court to the RESTATEMENT (2D) OF TORTS, § 875.[4] The Montana Supreme Court explained the relationship between the principle of joint liability and the "single indivisible injury" rule in the case of *Azure v. City of Billings*, 596 P.2d 460 (1979), stating as follows:

> The true distinction between actions of multiple tortfeasors which result in imposition of joint liability and those which do not is between injuries which are divisible and those which are not divisible. (citations omitted) If there is no concert of action, the courts look at the combined effect of the tortious acts and determine if the combined result is divisible. If it is not divisible joint and several liability will be imposed. (citations omitted)

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[4] RESTATEMENT (2D) OF TORTS, § 875, provides as follows:

> Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.

506 P.2d at 469-70. In slander, utterances directed to the same person by two or more persons are viewed as entire and distinct offenses and the harm resulting from each is considered distinct. *See, McKnight v. Scott,* 130 So.2d 681, 683-684 (La.App. 1961); *Yocum v. Husted,* 167 N.W. 663 (Iowa 1918).

## EXCLUSION OF TESTIMONY

Stiffarm asserts the court erred in precluding Stiffarm from eliciting testimony at trial from two individuals identified as Mr. Tom Patrick and Mrs. Linda Patrick-Hayes regarding the substance of conversations those individuals may have had with agents of the Railroad. The testimony was excluded pursuant to motion of the Railroad upon the ground Stiffarm had failed to timely disclose the substance of those conversations in accordance with the scheduling order implemented by the court, and in response to discovery requests properly served upon Stiffarm by the Railroad. The record upon this issue speaks for itself. However, the court reiterates the salient aspects of the record which belie Stiffarm's position.

The present action was filed on April 15, 1993. On March 9, 1994, Stiffarm, in accordance with the directive of Rule 200-5(a), RULES OF PROCEDURE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, filed a pre-discovery disclosure statement. In satisfaction of the requirement of subsection (a)(1)(iii) of Rule 200-5, Stiffarm identified, among other potential witnesses, Mr. Tom Patrick and Mrs. Linda

Patrick-Hayes.[5] The summary provided by Stiffarm with respect to Mr. Tom Patrick provides in pertinent part as follows:

> Mr. Patrick is the person who allegedly paid kickbacks to Stiffarm. He can testify about the railroad's investigation of the alleged kickback scheme. He can also testify as to the falsity of the allegations against Stiffarm and himself. He can confirm that the accusations escaped the railroad's sphere of control and made their way into the non-railroad community. He can also testify about the impact of these allegations against Stiffarm and his friends and associates.

The summary provided with respect to Mrs. Linda Patrick-Hayes did not differ in any substantial respect from that provided with regard to Mr. Patrick. Noticeably absent from the summary is the suggestion that Mr. Patrick would testify that an agent of the Railroad uttered slanderous remarks about Stiffarm to Mr. Patrick. This point is of particular significance, since the order of the court under scrutiny precluded Stiffarm from eliciting testimony from Mr. Patrick, to the effect, that an agent of the Railroad had uttered slanderous statements regarding Stiffarm to Mr. Patrick.

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[5] Rule 200-5(a)(1) requires every party to file a pre-discovery disclosure statement which sets forth, *inter alia*, the following information:

> (iii) the identity of all persons known or believed to have discoverable information about the claims or defenses, and a summary of that information.

On March 25, 1994, the court entered a scheduling order, under authority of Fed.R.Civ.P. 16, which established a September 23, 1994, deadline for the completion of discovery. At no time prior to the expiration of the discovery deadline did Stiffarm supplement his pre-discovery disclosure to indicate that Mr. Thomas Patrick or Mrs. Linda Patrick-Hayes were individuals to whom agents of the Railroad had purportedly uttered slanderous statements regarding Stiffarm.[6] Of more significance, however, are the responses provided by Stiffarm to interrogatories properly served upon him by the Railroad. The Railroad timely served the following interrogatory upon Stiffarm:

> State each and every fact upon which you base your claim that [the Railroad] defamed [Stiffarm].

The answer provided by Stiffarm does not identify either of the Patricks as an individual to whom an agent of the Railroad had uttered a slanderous statement regarding Stiffarm. While the answer states that "[Railroad] agents contacted persons who were not Railroad personnel and told these people that Stiffarm had taken kickbacks from

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[6] Rule 200-5(c), RULES OF PROCEDURE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, provides as follows:

> Supplementation of Disclosure – The disclosure obligation is reciprocal and continues throughout the case. A party who has made a pre-discovery disclosure is under a duty to seasonably supplement or correct the disclosure if the party learns that the information disclosed is not *complete* and correct or is no longer complete and correct. (emphasis supplied).

local contractors", the answer identifies only an individual by the name of Kenneth W. Ophus as a "non-railroad" person with whom agents of the Railroad had conversed.

A companion interrogatory served by the Railroad upon Stiffarm queried as follows:

> State specifically each and every agent or employee of [the Railroad] who you contend communicated false statements concerning [Stiffarm] to any person other than one who had a legitimate interest in receiving the communication and *identify each and every person by name, address, and telephone number to whom you claim that said statement was communicated.* (Emphasis supplied.)

The answer provided by Stiffarm identified only Kenneth W. Ophus as an individual to whom a false statement was communicated by an agent of the Railroad. The answer was further qualified by the following statement:

> Through further discovery and investigation, [Stiffarm] intends to obtain additional information concerning the subject matter of this interrogatory. This will require depositions of Burlington Northern officials and agents.

Review of the record reveals that the referenced interrogatories were never supplemented with information identifying either of the Patricks as an individual to whom a slanderous statement regarding Stiffarm was communicated.[7] Stiffarm first indicated to the Railroad

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[7] Stiffarm characterizes his failure to timely supplement his responses to the disputed interrogatories as an "innocent oversight", and proceeds to make the incredulous argument

that the Patricks were individuals to whom agents of the Railroad had purportedly communicated slanderous statements regarding Stiffarm on November 17, 1994, with respect to Mr. Tom Patrick and on December 2, 1994, with respect to Mrs. Linda Patrick-Hayes. With trial set to commence on December 5, 1994, Stiffarm's disclosure regarding the Patricks was untimely, and in direct contravention of the requirements of Fed.R.Civ.P. 26(e), Rule 200-5, RULES OF PROCEDURE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, and the scheduling order of this court entered under authority of Fed.R.Civ.P. 16. Stiffarm offers absolutely no reason justifying his lack of diligence. The court's decision limiting the testimony of the Patricks was necessary under the circumstances of this case to protect the integrity of the fact-finding process, and the inherent authority of this court. Therefore, for the reasons set forth herein,

IT IS HEREBY ORDERED that the motion for new trial presented by the plaintiff, Joe Stiffarm, be, and the same hereby is DENIED in its entirety.

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that he was not required by Fed.R.Civ.P. 26(e) to supplement his previous responses because the Railroad had, on an informal basis, interviewed Mr. Tom Patrick. Fed.R.Civ.P. 26(e) does not require supplementation where the information "otherwise [has] been made known to the other party during the *discovery process*." (emphasis supplied). Contrary to the assertion of Stiffarm, the Railroad's informal interview of Patrick is not part of the "discovery process" within the contemplation of Fed.R.Civ.P. 26(e). Stiffarm was under a clear obligation to supplement his responses to identify the Patricks as individuals to whom a slanderous statement regarding Stiffarm was communicated by an agent of the Railroad, if that was indeed the true state of affairs.

DATED this 23 day of January, 1995.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

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| JOE STIFFARM,<br>Plaintiff,<br>vs.<br>BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,<br>Defendant. | ) | NO. CV-93-045-GF<br>JUDGMENT ON VERDICT<br>(Filed Dec. 12, 1994) |

The above-entitled action having been tried before the Honorable Paul G. Hatfield, Chief Judge of the United States District Court for the District of Montana, and a jury, on December 5 to December 8, 1994; and the court having submitted special interrogatories to the jury, and the jury having answered the following special interrogatory in the negative:

QUESTION NO. 1:

Do you find, by a preponderance of the evidence presented, that plaintiff Joe Stiffarm was defamed by defendant Burlington Northern Railroad Company?

Therefore, IT IS ORDERED AND ADJUDGED that the plaintiff take nothing by way of his complaint as against the defendant Burlington Northern Railroad Company, that the action be DISMISSED on the merits,

and that the defendant shall recover its costs of action as against the plaintiff.

DATED at Great Falls, Montana, this 12 day of December, 1994.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

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| JOE STIFFARM,<br>Plaintiff,<br>vs.<br>BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,<br>Defendant. | ) | NO. CV-93-045-GF<br>MEMORANDUM AND ORDER<br>(Filed Aug. 2, 1994) |

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The plaintiff, Joe Stiffarm, moves the court, pursuant to Fed.R.Civ.P. 15, for leave to file an amended complaint. In addition, plaintiff requests the court reconsider its prior decision holding plaintiff's claim for intentional infliction of emotional distress was preempted by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* Having reviewed the record herein, the court is compelled to deny plaintiff's motions.

Accordingly, plaintiff's motion seeking leave to file an amended complaint is hereby DENIED.

Likewise, plaintiff's motion to reconsider is hereby DENIED.

DATED this 2nd day of August, 1994.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

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| JOE STIFFARM,<br>Plaintiff,<br>vs.<br>BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,<br>Defendant. | ) | NO. CV-93-045-GF<br>MEMORANDUM AND ORDER<br>(Filed Jan. 25, 1994) |

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The plaintiff, Joe Stiffarm, was, at all times pertinent to this action, an employee of the defendant Burlington Northern Railroad Company ("Railroad"), a carrier subject to the prescriptions of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* During the course of his employment with the Railroad, Stiffarm was the subject of an internal investigation conducted by the Railroad concerning a "kickback" scheme purportedly existing in relation to maintenance work performed under contract for the Railroad. During the course of the investigation, Stiffarm was subjected to interrogation by agents of the Railroad concerning his involvement in the purported scheme. Apparently, no disciplinary proceedings were ever instituted

against Stiffarm. Stiffarm alleges, however, the accusations made against him by the Railroad were communicated and disseminated in the community where Stiffarm lived and worked.

Stiffarm instituted the present action seeking monetary compensation for injuries he allegedly sustained as a result of the Railroad's conduct in conducting the investigation and interrogation of Stiffarm. Stiffarm advances claims for relief predicated upon intentional infliction of emotional distress and defamation. Stiffarm invokes the diversity jurisdiction of the court under 28 U.S.C. § 1332.

The Railroad moves the court to dismiss the action upon the ground the court lacks subject matter jurisdiction. Specifically, the Railroad contends Stiffarm's claims for relief under state law are preempted by the Railway Labor Act (45 U.S.C. §§ 151 *et seq.*), because the controversy involves a "minor" dispute falling within the exclusive jurisdiction of the National Railway Adjustment Board.[1]

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[1] In the alternative, the Railroad moves the court, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss the complaint upon the ground it fails to state a claim upon which relief can be granted. The Railroad's argument, however, is premised upon its conclusion that the plaintiff's claims, to the extent they might not be pre-empted by the Railway Labor Act, would be cognizable only under the Federal Employers' Liability Act (45 U.S.C. §§ 51 *et seq.*). This argument, however, is without mereit [sic]. At the very least, the complaint states a claim for defamation under state law. The motion is appropriately denied.

The essence of Stiffarm's complaint lies in his assertion that during the interrogation of Stiffarm, the Railroad, through its agents, engaged in a course of conduct that constituted an intentional infliction of emotional distress, and that subsequent to the interrogation, publicly disseminated information pertaining to the false accusations made against Stiffarm.[2] Stiffarm argues that neither of the state law claims is preempted by the Railway Labor Act because neither claim necessitates an interpretation or application of the collective bargaining agreement governing the employment relationship between Stiffarm and the Railroad.

Where the dispute between an employee and a carrier arises from "grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," the exclusive remedy for resolution of the dispute lies under the Railway Labor Act. 45 U.S.C. § 153 First (i); *see, Andrews v. Louisville & N.R. Co.*, 406 U.S. 320 (1972). Where the dispute is "minor" in nature, resolution of the dispute is committed to the

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[2] The operative allegations of the complaint relative to the claim for defamation state: "The false accusations the Railroad was making against the plaintiff were communicated and disseminated in the communities where the plaintiff lived and worked, resulting in the plaintiff's humiliation, emotional distress and anguish." The complaint does not expressly allege the Railroad, or its agents, communicated the information to a third party not associated with the investigation. In his brief filed in response to the Railroad's motion to dismiss, however, Stiffarm states the following: "By allowing this material to leak out into public, the Railroad either actively disseminated or permitted the dissemination of material that was slanderous *per se*."

exclusive jurisdiction of the Railroad Adjustment Board or to mediation procedures on which the parties have agreed, and be deprived of access to federal court for resolution of the dispute. 45 U.S.C. § 153 First (i); *see, Brotherhood of Railroad Carmen v. Pacific Fruit Express Co.*, 651 F.2d 651 (9th Cir. 1981).[3]

Stiffarm concedes that if an employee's claim is a "minor" dispute, state law is preempted and the claim is subject to compulsory arbitration by the National Railway Adjustment Board. Stiffarm, however, asserts that neither of his state-law claims are preempted because neither involves the interpretation or application of agreements concerning rates of pay, rules, or working conditions. The court turns to subject each claim to proper analysis.

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[3] The terms "major" dispute and "minor" dispute were first coined by the United States Supreme Court in *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711 (1944), to describe the disputes falling within section 2 and section 3 of the Railway Labor Act respectively. The Court in *Elgin* described major disputes as those "over the forming of collective agreements or efforts to secure them. They arise where there is no agreement or where it is sought to change the terms of one. . . . " 325 U.S. at 723; *see also, Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443, 445 (9th Cir. 1968). The Court in *Elgin* contrasted "minor" disputes as those which "relate either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." 325 U.S. at 723, *see also, Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d at 445.

## CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Stiffarm's claim for intentional infliction of emotional distress is based upon the actions of the Railroad in leveling the accusations of impropriety and *conducting the interrogation* of Stiffarm. A state-law claim sounding in tort and based on the carrier's alleged abuse of its investigatory process and presentation of false or misleading evidence against an employee is ordinarily viewed as a "minor" dispute falling within the exclusive province of the grievance mechanisms established by the Railway Labor Act. *See, Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369-70 (9th Cir. 1978), *cert. denied*, 439 U.S. 930 (1978); *see also, Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425, 428 (9th Cir. 1983). Stiffarm, however, suggests his complaint fits within the narrow exception to federal preemption recognized in *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290 (1977).[4] Upon balance the court is compelled to conclude

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[4] In *Farmer*, the Court held the National Labor Relations Act did not preempt an action for infliction of emotional distress based upon "outrageous" conduct by union officials in subjecting the petitioner's decedent to a campaign of personal abuse and harassment. The Court's holding was based upon its determination that the wrongful conduct was "a merely peripheral concern" of federal law and both the wrongful conduct and the impact of that conduct upon the decedent affected interests which were "deeply rooted in local feelings and responsibility." 430 U.S. at 296-97 (*citing, San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-244). "The cases [recognizing an exception to pre-emption] reflect a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with

Stiffarm's claim for intentional infliction of emotional distress falls on the *Magnuson* side of the line.

The conduct of which Stiffarm complains, *i.e.*, abuse of the investigatory process, serves as the basis for grievance proceedings under the Railway Labor Act. Allowing an employee aggrieved by the manner in which the investigatory process is utilized to prosecute a state cause of action would result in regulation, via state law, of conduct that Congress intended to protect. *Farmer*, 430 U.S. at 298. Stiffarm does not suggest that the investigatory process that may be utilized against an employee by the Railroad is not a matter arguably governed by the collective bargaining agreement. Consequently, the court is constrained to conclude that the misfeasance of the Railroad, or its agents, upon which the claim of Stiffarm is predicated, is "arguably" governed by the collective bargaining agreement and is properly classified as a "minor" dispute within the exclusive province of the grievance mechanism established by the Railway Labor Act. *Magnuson v. Burlington Northern, Inc.*, 576 F.2d at 1369-70.

## DEFAMATION CLAIM

The court, however, reaches an opposite conclusion with regard to Stiffarm's defamation claim. Although the

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federal regulation . . . [O]ur cases 'demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interest being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies.' " 430 U.S. at 300-301.

operative allegations of the complaint regarding the defamation claim are quite limited, they are sufficient to defeat a motion to dismiss. If Stiffarm can prove that the Railroad engaged in a course of conduct designed to defame Stiffarm, then Stiffarm would be entitled to pursue an appropriate remedy under the law of the State of Montana. The situation would be indistinguishable from that addressed by the Court in *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966). In *Linn,* the Court refused to preempt a defamation action under state law where the underlying conduct might also have served as a basis for an unfair labor practice under section 8 of the National Labor Relations Act (29 U.S.C. § 158). The rationale of *Linn* applies with equal force to the present case. Stiffarm's prosecution of his state-law claim for defamation presents little risk of interference with the effective administration of the national labor policy embodied in the Railway Labor Act.

Therefore, for the reasons set forth herein, IT IS HEREBY ORDERED that the defendant's motion requesting the court to dismiss this action for lack of subject matter jurisdiction be, and the same hereby is DENIED.

DATED this 25 day of January, 1994.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

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**MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY**

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Employers' Liability Act, 45 U.S.C., §51 et. seq. Under 45 U.S.C., §56, the railroad employee may bring his action either in a state district court or in a federal court.

2. By this Complaint, Joe Stiffarm elects to bring this action in the state court since the railroad has operations and facilities in Great Falls, Montana and the acts and omissions of the railroad, which led to this suit, occurred substantially within the state of Montana.

## II. CLAIM FOR INTENTIONAL INFLICTION OF MENTAL DISTRESS.

1. Joe Stiffarm is an American Indian. He grew up on an Indian reservation in northern Montana. He left the reservation as a young man and got a job on the Burlington Northern Railroad. He has now worked for the railroad for close to thirty years. He rose in the ranks from a track laborer to a railroad manager and foreman. He has established a reputation as a good leader and manager of men. He has done a loyal and productive job for the Company. He is well liked and respected by his men. His abilities are such that at times, the railroad has sent him to manage men and equipment for it all over the United States.

2. Through the fruits of his labor with the railroad, Stiffarm has been able to make a place for himself in Havre, Montana. With his wages, he has been able to purchase a nice home. He has also purchased personal property so that he can enjoy his life when he is not working. This includes a dependable motor vehicle, a

motor boat and other recreational and personal equipment and effects.

3. Joe Stiffarm is proud of his accomplishments, especially the work he has done for the Burlington Northern Railroad. Other American Indians look up to him for what he has achieved.

4. On or about October 3, 1991, Joe Stiffarm was performing his duties for the Burlington Northern Railroad Company along its railroad tracks near Havre, Montana. His immediate supervisor, Brian Olson, came to the work site and ordered Stiffarm to leave his job and travel with him to the BN headquarters in Havre, Montana. Olson did not inform Stiffarm why this was necessary. Nor had Stiffarm received any prior notice from the railroad concerning why it was necessary to report to headquarters.

5. When Stiffarm arrived at headquarters, two of the railroad's security police directed him into a room and turned on a tape recorder. One of them accused him of committing criminal felonies. The agent, Mike Bornus, said Stiffarm was taking monetary kickbacks from construction contractors in return for getting the contractors jobs with the railroad. Stiffarm immediately told the special agents that he was not in a position where he could award contracts, since this was done by railroad officials who were Stiffarm's bosses.

6. Despite Stiffarm's explanation, special agent Bornus continued to question Stiffarm for over an hour. Over and over again, he would say things like, "Has there ever been an occasion that anyone has given you anything . . . for any favor or work on the railroad". Over

and over again, Stiffarm would tell him no and that this was not possible, since he does not get involved with the making of contracts. The agent would then insinuate that Stiffarm had purchased his home and his personal property through bribes. He would say things like, "Have [the contractors] ever made things like your boat payments? Your house payments?" Not satisfied, the agent would then start asking Stiffarm to detail his private financial affairs, including how much he had paid for his home, his vehicle, and his boat and where he got the money to buy them.

7. Stiffarm would explain everything, but the interrogation would continue. The agent would repeat himself. Did any of the contractors "give you any cash?" Did they ever "offer you any cash?" Stiffarm would tell him, "I said no sir. None of them. I value my job more than that. I'm smarter than that." But the agent would continue the interrogation.

8. At times, the agent would turn the tape recorder off. He would then tell Stiffarm that he was his "friend" and he was conducting the interrogation "to help you." He told Stiffarm that he had proof that he had taken kickbacks, and if Stiffarm would just confess, he could "help him." But if Stiffarm wouldn't come clean, he would lose his job and go to jail. Stiffarm refused and told him he wouldn't confess because he had not taken kickbacks.

9. The interrogation continued. The agent wanted Stiffarm to produce his "bank records, or your deposit tickets and your check stubs and all of that". He would not take Stiffarm's word, as a man who had devoted his

life to the railroad for close to three decades, that he had never taken kickbacks. He either did not or would not verify that Stiffarm was in no position to award contracts anyway.

10. The questioning continued. The same things were asked over again. The agent reported he "had information that you" are involved in kickbacks. He stated people were telling him [Bornus] this, but he did not tell Stiffarm who they were.

11. Another time, the agent told Stiffarm to "come clean" so that they wouldn't have to do this "another way". References were made that it was "pretty dog gone important" to Stiffarm's "livelihood" that he talk before the agent left town that night. This was Stiffarm's "chance to get it off [his] chest and be done with it. But after today" things would be different. The agent was careful to turn off the tape when making more explicit threats.

12. A copy of portions of the interrogation that were taped is attached hereto as Attachment "1" and incorporated by reference.

13. Before Stiffarm left, special agent Bornus directed him to help prove his own innocence. He should go out and gather up all financial records and provide proof that he bought his house and property honestly with his own money. This request was not placed on the audio tape. Nor was it set forth in writing. Stiffarm complied. In the next several days, he traveled to various financial institutions to obtain documentation showing he had purchased his property with the wages he had been paid by the railroad.

14. Special Agent Bornus knew within a week that the accusations he had made against Stiffarm were false. On October 11, 1991, he wrote his superiors that:

> "Stiffarm is and has been a Section foreman in the Havre yard. As such *he is not in a position to have anything to do with B&B projects [involving contractors].* With regard to Section work, again, according to Roadmaster Olson and Division Engineer Barclay, *he has no authority to negotiate or award work to outside contractors.* This is supported by the fact that *in none of the cases cited [alleging Stiffarm's involvement in kickbacks], did Stiffarm initiate or direct who got the job."*

More to the point, special agent Bornus stated:

> "Have developed *no* witnesses or other evidence to support 'payoffs' to Stiffarm."

Bornus then explained that Stiffarm's records showed he bought his property with the wages he earned on the railroad. All of the information necessary to recognize these conclusions was already available to the railroad before it interrogated Stiffarm. It therefore had no basis to use the outrageous, fraudulent, and intimidating methods it employed.

15. Copies of the railroad's documents containing this report are provided as Attachment "2" and are hereby incorporated by reference.

16. Although special agent Bornus had reported his conclusions to his superiors within a week of interrogating Stiffarm, the railroad chose not to inform Stiffarm that he had been cleared. It closed its investigation by mid-November, 1991. It left the charges hanging over Stiffarm's head.

17. Approximately a month after Stiffarm's interrogation and the railroad's written conclusions that there was "no witnesses or other evidence to support 'payoffs' to Stiffarm," Stiffarm wrote a letter to the railroad proclaiming his innocence and telling the railroad that he was "quite upset and resentful that the accusations had been made." He requested that the railroad immediately provide him with "any information, written or otherwise, [it] had compiled about [him] and your allegations that he has been involved with contractor kickbacks". He asked for the "names and addresses of the persons who are making these allegations". The railroad refused to comply. Special agent Bornus misrepresented that he had never made accusations.

18. A second attempt to obtain this information was made by letter on December 5, 1991. A copy of the audio tape of Stiffarm's interrogation was eventually provided, but the railroad refused to turn over other information. It still refused to tell Stiffarm he had been cleared or to reveal the identity of persons who had made the false accusations.

19. A third request was made in writing on December 16, 1992. The railroad was informed that in the year since the railroad had made accusations about kickbacks, "slanderous accusations have now been disseminated throughout the community". This was "obviously a serious matter" and "prompt information from Burlington Northern" was needed. If it was not provided by January 1, 1993, a lawsuit would be commenced. Still, the railroad refused to divulge anything, even though it had been informed in writing that its worker of 27 years was "quite upset and resentful that the accusations had been

made" and that they had now spread "throughout the community."

20. Stiffarm then commenced a lawsuit in federal district court. Among other things, he requested the results of the investigation and the identity of those making false accusations. Still, the railroad refused to divulge any information. The two year statute of limitation, which might apply to at least some of the claims Stiffarm could bring against persons slandering him, came and went.

21. Finally, the railroad was forced by law to surrender the contents of the investigation. As shown above, it revealed that the railroad had no evidence that Stiffarm had broken the law – let alone committed felonies. Thus, there was no basis for the railroad refusing to clear Stiffarm's name for 2½ years nor for its decision to leave the charges hanging over his head.

22. The investigation also revealed that the matter had originally been instigated by two local construction contractors who were making "allegations of favoritism" and "kickbacks", but that "no evidence" had been "developed" in the "comprehensive investigation" supporting those allegations. In fact, the contractors who were making the allegations were obtaining most of the contracts from BN already. A copy of the written requests for this information is provided as Attachment "3" and is hereby incorporated by reference.

23. The conduct set forth above constitutes wrongdoing towards an employee under the FELA, 45 U.S.C. 51 et. seq. The Act has been construed by the United States

Supreme Court as covering both negligent and intentional wrongdoing by a railroad against employees and covers emotional and mental stress even in the absence of physical contact.

24. The acts and omissions of the defendant railroad as set forth above constitute the tort of intentional infliction of mental distress. The railroad is acting intentionally and/or recklessly to cause Stiffarm to suffer emotional distress and its conduct is extreme and outrageous. The manner in which it conducted its interrogation was designed to achieve this end. To coerce a confession out of Stiffarm, the railroad interrogated Stiffarm without notice of the investigation beforehand. It interrogated him on and off the record in a manner designed to instill fear in him. It told him off the record he would lose his job and go to jail if he did not come clean. It inferred the same thing when the recorder was turned on. It falsely inferred and represented that it had proof of his alleged felonious wrongdoing.

25. The railroad also deliberately and/or recklessly caused emotional distress by refusing to clear Stiffarm of the allegations. It knew within a week that it had no evidence of wrongdoing. It closed its investigation a few weeks later. But it never told Stiffarm he was cleared, and thus it allowed the false charges to linger. When Stiffarm informed the railroad of the stress and anger the investigation was causing, it refused to tell him that that the investigation was closed and that the findings showed he had done nothing wrong. It forced Stiffarm to file a lawsuit to obtain the documentation, which cleared his name, but still refused to divulge the documents until so

much time had passed that it jeopardized Stiffarm's ability to make legal claims against the persons who had made the false accusations in the first place. It allowed the false charges to persist, even though Stiffarm had notified it that the matter had gotten out into the community where he lived. It did little to prevent this from happening and nothing to set the record straight. To this day, it has not apologized for its despicable mistreatment of this longtime employee.

26. The railroad's misconduct did cause severe emotional distress. Stiffarm suffered severe anxiety and depression. He could not sleep. He felt sick. He could not concentrate on his work or enjoy himself when off work. He became obsessed with worry. He felt disgraced and humiliated. His standing in the community and among his fellow native Americans has been compromised. All that he had given to his employer over the years and the record he had made for himself, obviously, meant nothing to his employer. He continues to suffer severe emotional distress and anger to this day, almost three years after the events transpired.

27. Because of this misconduct, Stiffarm requests that the Court and jury award all damages that are just, including damages for his severe emotional distress and all other injuries he has sustained under the facts.

DATED this 22nd day of September 1994.

THUESON & LAMB

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**MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY**

| | |
|---|---|
| JOE STIFFARM,<br>Plaintiff,<br>-v-<br>BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,<br>Defendant. | No. ADV-94-1063<br>**MOTION TO DISMISS**<br>(Filed October 17, 1994) |

Defendant Burlington Northern Railroad Company moves the Court for an order dismissing this case for the following reasons:

1) The facts alleged in plaintiff's complaint have already been the subject of rulings by United States District Court for the District of Montana, Great Falls Division;

2) This Court does not have subject matter jurisdiction of plaintiff's claims;

3) Plaintiff's complaint fails to state a claim for which relief may be granted.

The grounds for this motion are that (1) because of the rulings by the federal court, the case should be dismissed on comity grounds, (2) plaintiff's claims are preempted by the Railway Labor Act, 45 U.S.C. §151 *et. seq.*, and (3) the allegations of plaintiff's complaint do not state a claim for relief under the FELA, 45 U.S.C. 51 et. seq., as will be set forth more fully in a brief to be filed within five working days of this motion.

Dated this 14th day of October, 1994.

KROSCHEL & YERGER

By: /s/ Dennis Nettiksimmons
Dennis Nettiksimmons
Attorneys for Burlington
Northern Railroad Company

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and correct copy of the foregoing MOTION TO DISMISS upon counsel of record by the following means:

| | |
|---|---|
| Erik B. Thueson | [X] U.S. Mail |
| John A. Kutzman | [ ] Facsimile |
| THUESON & LAMB | [ ] Express Mail |
| P.O. Box 535 | [ ] Hand Delivery |
| Helena, Montana 59624-0535 | |

DATE: 10/14/94

/s/ Dennis Nettiksimmons